NO. 46304-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

ALFRED G. BURTON, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-02167-0

Brief of Respondent

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RESPONDENT'S ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Burton's motion to redact material false statements from the declaration of probable cause.

2. The trial court erred when it found "there were no deliberate omissions or a reckless disregard for the truth" in the Declaration of Probable Cause.

ISSUES PERTAINING TO RESPONDENT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied Mr. Burton's motion to redact material false statements from the declaration of probable cause.

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INTRODUCTION – LEGISLATIVE HISTORY

In 1998 Washington enacted the Medical Marijuana Act, RCW 69.51A (Medical Use of Marijuana Act)(MUMA). MUMA permitted patients with terminal illnesses and/or debilitating medical conditions to grow, possess, and use marijuana. MUMA permitted patients to possess a sixty day supply of marijuana. MUMA did not say what a sixty day supply of marijuana was, nor did it say where patients were to get marijuana, seeds, or any of the other materials necessary to grow marijuana to create that sixty day supply.

In 2008, ten years after the enactment of MUMA, the Department of Health set the limit for a sixty day supply of medical marijuana at fifteen plants and twenty-four ounces of useable marijuana. However, like MUMA, DOH provided no guidance as to where patients were to get marijuana, seeds, or any of the other materials necessary to grow fifteen marijuana

plants or process twenty-four ounces of marijuana.

Even though both the legislature and DOH remained silent as to how patients were to procure marijuana, one simple postulate remained: "if it is lawful for patients to possess marijuana, it must be lawful for someone to give or sell that marijuana to them." Similarly, "if it is lawful for patients to grow marijuana, it must be lawful for someone to give or sell those seeds, clones, and other supplies to them."

To that end, roughly five years ago, the State witnessed a proliferation of medical marijuana "dispensaries." These dispensaries provided safe and reliable access to medical marijuana for medical marijuana patients, and provided a safe alternative to black market street sales of marijuana to medical marijuana patients.

The dispensaries were controversial to say the least. Some jurisdictions welcomed dispensaries, while other jurisdictions arrested and prosecuted the owners of the dispensaries. And, even though the owners of the dispensaries knew they might be arrested, literally hundreds of dispensaries opened throughout the state. Chaos ensued.

Responding to the complaints of Cities, Counties, and Law Enforcement, the needs of patients, and the complaints of the dispensary owners, in 2010, the State Legislature acted to update RCW 69.51A.

In 2011, the State Legislature passed Senate Bill 5073 (SB 5073). SB 5073 established a comprehensive regulatory scheme for growing, processing, and delivering medical marijuana. SB 5073 provided for the

licensing of growers, processors, and dispensaries. SB 5073 regulated the quality, quantity, and delivery of medical marijuana. SB 5073 changed the name of the Act from the Medical Use of Marijuana Act- MUMA to the Medical Use of Cannabis Act – MUCA.

Alongside of the comprehensive regulatory scheme, which established a complex and far-reaching set of rules which regulated and controlled the commercial distribution of medical cannabis, the legislature also created the "collective garden." Unlike the newly established and highly regulated commercial distribution system, the collective garden provided a way for individual patients to produce, process, and deliver medical cannabis for themselves independent of the highly regimented and regulated commercial system.

Independent of the highly regimented and regulated commercial medical marijuana distribution system, meant that a collective garden was not an organization, institution, business, or entity. The collective was not required to be licensed or registered. Other than the authorizations and identifications of the participating patients, a collective garden was not required to keep any records.

When SB 5073 went to Governor Gregoire for signature, she vetoed thirty six sections of SB 5073. The Governor vetoed every section of the bill which required state employees to participate in the regulation of growing, processing, and delivery of medical cannabis . The Governor's veto left the State with virtually no regulatory scheme and

virtually no rules addressing the growing, processing, and delivery of medical marijuana.

The Governor rejected and discarded the newly designed regulatory scheme, embraced collective gardens, and maybe most importantly, left intact the overall intent of the new medical marijuana statute, making medical marijuana lawful. Now, being lawful as opposed to unlawful, SB 5073 changed the nature of the affirmative defense available to medical marijuana patients.

Prior to SB 5073, when medical marijuana Was still a crime, medical marijuana patients were afforded an affirmative defense wherein they sought to have criminal conduct excused. Now, after SB 5073, which refers to the lawful use, possession, manufacturing, and delivery, medical marijuana patients are afforded an affirmative defense wherein they seek to prove that their conduct was in fact lawful.

The new statute states that, "[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime...." The statute now provides an exception to the general controlled substances statute as opposed to a violation which requires the type of affirmative defense for which one seeks to be excused from criminal conduct.

The Governor's veto also, by default, left the "collective garden" as the only means of distributing of medical cannabis to patients who could not grow their own medicine.

The collective garden, found at RCW 69.51A.085, authorizes qualifying patients to create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use. A collective garden may have up to ten qualifying patients participating in a single collective garden *at any time*; may contain up to fifteen plants per patient up to a total of forty-five plants (requiring a minimum of three patients); may contain up to twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis (also requires a minimum of three patients); and useable cannabis from the collective garden may be delivered to anyone of the qualifying patients participating in the collective garden.

A collective garden is, by definition, an agreement between patients to help one another by sharing in the growing, transporting, and delivery of medical marijuana. "[C]ollective garden" means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants. RCW 69.51A.085(2).

RCW 69.51A.085 does not limit the number of collective gardens to which a patient may belong. Nor does it prevent new patient members

from participating in the garden when, for a variety of possible reasons, the number of participating patients falls below ten. The statute does not impose any requirements which address length of membership or waiting period before admits a new member/participating patient when the garden needs/wants to bring the number of participating patients up to ten.

Sitting alongside a comprehensive regulatory system, the legislature never intended the collective garden to be the primary distribution system for medical marijuana in the State of Washington. However, the governor's veto left the medical marijuana patients of the state with no state regulated distribution system. Consequently, if patients could not grow their own marijuana, they had only two options: 1) buy marijuana illegally on the streets, or 2) participate in a collective garden. Because most patients are not able to grow marijuana, collective gardens began popping up all over the state.

Cities and Counties reacted to these collective gardens in a variety of ways. Some jurisdictions welcomed collective gardens; some jurisdictions enacted moratoriums or outright bans; while others were apparently indifferent.

Pierce County does not license collective gardens or medical marijuana dispensaries. However, as an enforcement matter, Pierce County appears to be largely indifferent to the presence of collective gardens and has taken no action to eliminate collective gardens from operating in Pierce County. With the exception of the Defendant, Mr.

Burton, and possibly a few others, the Pierce County Prosecutor has opted not to prosecute patients participating in collective gardens.

STATEMENT OF THE CASE

1. Statement of Procedure

On June 12, 2012, the State charged Mr. Burton with unlawful possession of a controlled substance with intent to deliver. CP 1. On December 16, 2013, the parties appeared before Judge Rumbaugh. 1 RP 1.[1]

Contrary to the prosecutor's statement of the case, the court did not hear oral argument on Mr. Burton's *Knapstad* motion. 1 RP 76. At the conclusion of the *Franks* Hearing, the Court stated "... so the Franks motion will be denied, and we can move forward with a Suppression Hearing. I think the closer you get to the Knapstad Hearing, the more there is going to be interplay between the two, but just in order to make a record that is cogent, we will start with the 3.6 Hearing ..." 1 RP 76.

Prior to Mr. Burton's 3.6 hearing, the Court conducted a Franks hearing wherein Mr. Burton moved to strike material false statements from the Declaration of Probable Cause which Deputy Jarvis made intentionally, deliberately and with a reckless disregard of the truth. CP 28. The Court denied Mr. Burton's motion. 1 RP 76.

Subsequent to the Franks hearing, the Court heard Mr. Burton's motion to suppress. 1 RP 79. Mr. Burton argued that, in applying for the

[1] Mr. Burton adopts the State's scheme of reference to the Verbatim Report of Proceedings, to wit: the December 16, 2013 pretrial proceedings as 1 RP; the April 25, 2014 pretrial proceedings as 2 RP.

search warrant in this case, Deputy Jarvis failed to set forth facts and circumstances which would lead a reasonable person to conclude that Mr. Burton was engaged in criminal conduct. CP 3-18. Mr. Burton argued that, in the Declaration of Probable Cause, Deputy Jarvis set forth facts and circumstances which would lead a reasonable person to conclude that Mr. Burton was in fact engaging in law abiding behavior. CP 3-18. The Court agreed with Mr. Burton and granted his motion to quash the search warrant. 1 RP 100-07. The Court also granted Mr. Burton's motion to suppress the evidence seized pursuant to the execution of that warrant. 1 RP 100-07.

With the evidence suppressed, the Court granted the State's motion to dismiss the charge against Mr. Burton. CP 37-40. The State appealed to this Court.

2. Statement of Facts

April 27, 2012, Pierce County Sheriff's Deputies Johnson, Nordstrom and Jarvis contacted Mr. Burton at the office of Green Path of Washington, a collective garden located at 10118 224th St. E., Graham, WA 98338. CP 48.

Green Path of Washington is a collective garden. CP 31. Green Path Collective Garden is a private facility open to members (participating patients) and prospective members only. CP 31. From this location, Green Path Collective Garden conducts member services; this also the location where members of the collective garden access medical marijuana. CP 29.

When deputies arrived, they saw, attached to Green Path's glass front door, a "Notice to Law Enforcement." CP 49; Ex 1. The Notice clearly and unambiguously advises law enforcement that nobody on the premises is waiving any constitutional rights. Ex 1. The Notice advises law enforcement that if a patient member of the Green Path collective garden did not call for them, they are not welcome and are formally requested to leave. Ex 1. The Notice also advises law enforcement that they do not have, nor will they receive, consent to conduct a warrantless search. Ex 1. The Notice further advises law enforcement that nobody on the premises consents to questioning. Ex 1. The Notice instructs law enforcement to direct all inquiries to Green Path's attorney. Ex 1. In this case, the deputies disregarded the Notice and entered the facility anyway. CP 49-51.

Washington Courts have long accepted that adversarial contact between a civilian and armed uniformed police officers is inherently coercive. (See *State v. Ferrier,* 136 Wn.2d 103, 960 P.2d 927 (1998)("Central to our holding is our belief that any knock and talk is inherently coercive to some degree.") In this case, the Sheriff's Deputies were not only coercive, they were abnormally aggressive and intimidating. *See* CP 49-51.

The deputies could not advance past the lobby or reception window because the rest of the facility is secured behind a locked metal door. CP 49. Deputies did however contact Mr. Burton who was behind the reception window where he was seated next to garden member Dan Bivens. CP 35.

Deputy Nordstrom engaged in conversation with both Mr. Burton and Mr. Bivens. CP 34. Deputy Jarvis and Deputy Johnson listened to the conversation but apparently did not participate. CP 33-35.

Mr. Burton told Deputy Nordstrom that Green Path is a collective garden. CP 29. Deputy Nordstrom commented that he did not see or smell growing marijuana. CP 29. Mr. Burton told Deputy Nordstrom that the "garden" where the marijuana is actually grown was at a different location. CP 29. Deputy Nordstrom did not ask, and Mr. Burton did not disclose, where the marijuana was actually grown. *See* CP 29.

Mr. Burton told Deputy Nordstrom that Green Path Collective Garden's office serves as a sort "clubhouse" wherein members of the garden perform membership services. CP 29. The office serves as a place for members to gather, and as a safe access point where members of the collective garden may safely access their medicine. CP 29.

In the Declaration of Probable Cause, Deputy Jarvis stated that Mr. Burton told Deputy Nordstrom that he was not a qualifying patient. CP 50. However, Mr. Burton was a qualifying patient with valid documentation at the time of contact with law enforcement. CP 35. Mr. Bivens was also a qualifying patient with valid documentation at the time of contact with law enforcement. *See* CP 35. Mr. Burton's and Mr. Bivens' valid documentation was posted on the wall of the Green Path office. Ex. 3. That valid documentation for both men was admitted into evidence at Mr. Burton's

Franks hearing. Ex. 3. The Court referred to both authorizations when it granted Mr. Burton's motion to quash the search warrant.

Deputy Nordstrom asked to see the qualifying patients' valid documentation. CP 29. Mr. Burton directed the officers' attention to two black file folders located on the office wall; the black file folders contained the valid documentation of the garden's most recent members. CP 29. Deputy Jarvis noted in his report that the qualifying patients' valid documentation was readily available as he could see the black files and that those files contained a three inch stack of papers clipped into six different bunches. CP 29

However, even though the participating patients' documentation was readily available, the officers did not have a search warrant. CP 49-51 Mr. Burton agreed to waive his right to a search warrant only if his attorney could be present when Deputies examined the patients' documentation. CP 29.

Mr. Burton called his attorney. CP 30. The attorney spoke to the Deputies and invited them to set an appointment so that they could inspect the records. CP 30. The Deputies were noticeably incensed (to put it mildly) at Mr. Burton for exercising his right to a search warrant and his right to counsel. *See* CP 49-51. The Deputies refused to inspect the readily available records in the presence of Mr. Burton's attorney, and declined the attorney's invitation. CP 30.

Mr. Burton explained to Deputy Nordstrom that Green Path collective garden strictly complies with RCW 69.51A.085. CP 49. Only members of the collective garden are permitted to access medical cannabis from the collective garden. CP 50. Authorized patients must apply for membership to the garden. CP 29. If that patient meets both the legal requirements and the collective garden's requirements, and if the garden has one of its ten memberships available, the patient is allowed to become a member of Green Path collective garden. CP 29. As a member, or participating patient of the collective garden, that patient is allowed to access medical cannabis. CP 29.

At no time prior to, or during this conversation with Mr. Burton and Mr. Bivens, did the officers see any marijuana (growing or otherwise); see any activity which might resemble a transaction; or for that matter, even see anybody coming or going from Green Path. CP 49-51.

On May 2, 2012, Deputy Jarvis obtained a search warrant. CP 54. Pierce County Sheriff's Deputies served and executed the warrant on May 4, 2012. CP 55.

When deputies arrived at Green Path Collective Garden's office to execute the search warrant, none of Green Path's members had arrived, and Green Path's office was not yet open. 1 VP. Deputies kept the office under surveillance until Mr. Burton arrived at about 11:45 am. 1 VP. Deputies met Mr. Burton as he drove up in his car. 1 VP. They advised

Mr. Burton of his Miranda rights; he stated that he would speak to his attorney. 1 VP. The officers asked no further questions. 1 VP.

Mr. Burton would not consent to a search of his car. 1 VP. Deputies seized his car so they could get a search warrant.[2] 1 VP.

Because Green Path's office had not yet opened, and no members had yet arrived, there were not yet any member records in Green Path's office. 1 VP. Accordingly, deputies recovered no patient records during their search of Green Path Collective Garden's office. 1 VP. The two black file folders police observed on April 27th the files which Green Path's attorney had previously offered up for inspection, were no longer in the office. 1 VP. Green Path regularly relocates the member/qualifying patient records which are not in use for safe keeping.[3] 1 VP.

Deputies conducted their search and seized medical marijuana in various forms; smokeable, edible, etc. 1 VP. They also seized office supplies and computers. 1 VP.

[2] Subsequently, the deputies served a search warrant on the vehicle. They did not locate any cannabis or cannabis products in the car.

[3] As part of discovery, Mr. Burton provided the State nearly 3000 pages of signed and dated patient registration sheets which prove that there were never more than ten patients participating at any time.

LAW AND ARGUMENT

I. THE COURT ERRED WHEN IT DENIED MR. BURTON'S MOTION TO REDACT MATERIAL FALSE STATEMENTS FROM THE DECLARATION OF PROBABLE CAUSE WHEN THOSE MATERIAL FALSE STATEMENTS WERE INTENTIONAL, DELIBERATE, AND WITH A RECKLESS DISREGARD OF THE TRUTH.

1. The Declaration of Probable Cause

To obtain the search warrant in this case, Deputy Jarvis contacted Judge Cuthbertson, Pierce County Superior Court. Deputy Jarvis makes the following claims in the Declaration of Probable Cause (CP 49-51):

1. April 27, 2012 – 1345 hours – Deputies Nordstrom and Jarvis contacted Green Path of Washington;

2. Green Path is a *store which distributes marijuana*;

3. Front of *store* separated from rest of *business*;

4. Small window through which to make contact;

5. Access to back of *store* via locked metal door;

6. Letter advising law enforcement that they are not welcome at the *business* unless directed there by appointment with the *business's* attorney;

7. Contacted Alfred Burton;

8. Mr. Burton stated that he was one of the owners of the *business*;

9. Mr. Burton said Green Path was a collective garden;

10. Deputy Nordstrom stated he could neither see nor smell growing marijuana;

11. Mr. Burton stated actual "garden" was elsewhere (Mr. Burton declined to say exactly where);

12. Mr. Burton explained that the storefront where they were served as the garden's "clubhouse" and functioned as a gathering place for members and served as the garden's distribution hub;

13. Washington law mandates that a collective garden have a copy of each of its ten patients' ID's and medicinal marijuana authorization available for inspection at all times;

14. Mr. Burton told Deputies that documents were located in two black folders located on the office wall;

15. Mr. Burton refused to let officers view files;

16. Deputy Jarvis could see a 3" stack of papers clipped into 6 different bunches;

17. Mr. Burton stated that members of collective garden signed up in a revolving-style membership; he explained that when a *customer* arrived at the *store* and signed in, they became a member of the collective garden for as long as they remained in the *business* (or to use Mr. Burton's words "club house");

18. When the *customer* left, they relinquished their membership in the garden, allowing another member to take their place;

19. This system of transient membership would allow Burton to dispense marijuana to significantly more than the 10 people allowed by Washington State Law;

20. Curiously, Burton, by his own reasoning, as there were no *customers in the store* when we visited, rendering his collective garden number-less and, as Burton said that he was not a medicinal marijuana patient, *therefore had no legal reason to be in possession of marijuana*;

21. Mr. Burton reached lawyer;

22. Lawyer invited officers to make an appointment to see Mr. Burton's members' records;

23. In spite of officer's efforts to talk him out of it, Mr. Burton stated that he would take his attorney's advice and not allow them to review his garden's membership paperwork;

24. During contact, Mr. Burton remained in back of the *business*; conversation was through a small window;

25. Mr. Burton explained that he kept several different strains of marijuana on hand;

26. Mr. Burton stated that he made every effort to make sure that a patient got a strain of marijuana that would benefit their particular ailment;

27. The lobby of the *building smelled strongly of marijuana*;

28. NEW SECTION **Sec. 403.** (1) Qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use subject to the following conditions:

(a) No more than ten qualifying patients may participate in a single collective garden at any time;

(b) A collective garden may contain no more than fifteen plants per patient up to a total of forty-five plants;

(c) A collective garden may contain no more than twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis;

(d) A copy of each qualifying patient's valid documentation or proof of registration with the registry established in *section 901 of this act, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden; and

(e) No useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.

(2) For purposes of this section, the creation of a "collective garden" means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.
(3) A person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter.

29. Green Path does not contain a garden of growing marijuana;

30. Is not a collective of ten medicinal marijuana patients bonding together to support their medical needs;

31. It is a *business* which appears to focus solely on the distribution, sale, and dispensation of marijuana for profit;

32. I drove by Green Path May 2, 2012 and confirmed that the *business* was still open.

2. Testimony at the Franks Hearing

In the Declaration of Probable Cause, Deputy Jarvis claimed that it was he and Deputy Nordstrom who contacted Green Path. However, both Deputy Jarvis and Deputy Nordstrom testified that there were actually three officers present. Deputy Jarvis intentionally omitted a material witness, Deputy Johnson, from the declaration.

In the Declaration of Probable Cause, Deputy Jarvis stated that he and Deputy Nordstrom contacted Alfred Burton. Deputy Jarvis intentionally omitted the fact that, seated next to Mr. Burton was a person by the name of Daniel Bivens, and that Mr. Bivens also participated in the conversation. Deputy Jarvis also testified that Mr. Bivens was quite talkative and that some of the statements in the declaration attributed to Mr. Burton may have actually come from Mr. Bivens and *not* Mr. Burton. Deputy Jarvis intentionally omitted a material witness and that witness' participation in the conversation is material because the conversation constitutes nearly all of the "evidence" in the Declaration of Probable Cause.

In the Declaration of Probable Cause, Deputy Jarvis claimed that Mr. Burton told the officers that he was not a medical marijuana patient. Testimony clearly established that Deputy Jarvis' claim was in fact false.

Even so, in the Declaration of Probable Cause, Deputy Jarvis stated that Mr. Burton was in violation of RCW 69.51A.085 and "therefore had no legal reason to be in possession of marijuana."

The statement attributed to Mr. Burton is perhaps the most important statement in the Declaration of Probable Cause. Here, Deputy Jarvis intentionally (deliberately) changed the words in order to create the appearance of unlawful conduct where none actually existed. At the Franks hearing the Court admitted into evidence both Mr. Burton's and Mr. Bivens' valid authorizations. It is an undeniable fact that both Mr. Burton and Mr. Bivens possessed a valid authorizations and that the valid authorizations were posted on the wall along Washington Identification as required by RCW 69.51A.085.

Deputy Nordstrom testified that the statement attributed to Mr. Burton may not be accurate. Deputy Nordstrom said that what may have actually been said was "I don't even use the medicine." Even more significant is when Nordstrom also stated that it may not have been Mr. Burton who made the statement that it may have been Bivens who actually made the statement. Like Deputy Nordstrom, Deputy Jarvis testified that "what was most likely said was 'I don't even use the medicine,' and that it may have actually been Mr. Bivens who said it. Deputy Jarvis' intentionally changed the most significant statement in the declaration and intentionally changed the identity of the person who made the statement.

In the Declaration of Probable Cause, Deputy Jarvis freely uses the word *business*, *store*, and *customer*. Under oath, Deputy Jarvis admitted that the words *store*, *customer* and *business* were not the result of the investigation/conversation with Mr. Burton. Deputy Jarvis admitted that he did not see anybody come or go who might have been a *customer.* He used the used words *store* and *business* without actually obtaining any evidence that Green Path was *store* or *business.*

Deputy Jarvis testified that he did not have, and did not acquire, any evidence of business activity at Green Path. Deputy Jarvis stated that his only criteria for using the words *store* and *business* was that Green Path had a sign and there was no marijuana actually growing at that location. Because Deputy Jarvis assumed he was in a *store* or *business*, he intentionally replaced the words *members* and *patients* with the word *customers*.

Deputy Jarvis testified that while at Green Path, nobody came in or out of the building; he did not observe any conduct which would lead a reasonable person to conclude that he was in a *store* or *business*. None of the three deputies, Jarvis, Nordstrom, or Johnson observed any business activity and provided no evidence of business activity in the Declaration of Probable Cause.

Even though there is no evidence of business activity, Deputy Jarvis intentionally and deliberately uses the words *store* and *business.* He uses those words instead of "*collective garden*" because a marijuana *store*

or *business* may not be lawful under RCW 69.51A while a *collective gardens* is explicitly lawful under RCW 69.51A.085. Deputy Jarvis knew that if he used the correct term *collective garden* instead of *store* or *business* he would be describing lawful activity and it would therefore be unlikely that he would be granted a search warrant.

3. When an officer intentionally, deliberately, and/or with reckless disregard of the truth makes material misrepresentations of fact, those material misrepresentations must be redacted from the Declaration of Probable Cause.

Deputy Jarvis intentionally, deliberately, and/or with reckless disregard for the truth, made material misrepresentations of fact. Once Detective Jarvis' material misrepresentations are redacted from the declaration of probable cause, there is insufficient evidence by which to find probable cause in support of the warrant. With no probable cause, the search warrant must be quashed and the evidence seized in the execution of the search warrant must be suppressed.

Article I, section 7 of the state constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." A search warrant may be issued only on a determination of probable cause. *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d (2013); citing *State v. Jackson,* 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause exists when the affidavit in support of the search warrant "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal

activity and that evidence of the crime may be found at a certain location." *Id.*

A search warrant may be invalidated if material falsehoods were included in the affidavit intentionally (deliberately) or with reckless disregard for the truth, or if there were deliberate or reckless omissions of material information from the warrant. *Ollivier*, at 847; *State v. Chenoweth,* 160 Wn.2d 454, 478–79, 158 P.3d 595 (2007); *State v. Garrison,* 118 Wn.2d 870, 872–73, 827 P.2d 1388 (1992). If the defendant makes a substantial preliminary showing of such a material misrepresentation or omission, the defendant is entitled to a *Franks* hearing. *Id.; Garrison,* 118 Wn.2d at 872, 827 P.2d 1388. If at the hearing the defendant establishes the allegations, then the material misrepresentation must be stricken or the omitted material must be included and the sufficiency of the affidavit then assessed as so modified. *Id.; State v. Cord,* 103 Wn.2d 361, 367, 693 P.2d 81 (1985). If at that point the affidavit fails to support a finding of probable cause, the warrant will be held void and evidence obtained when the warrant was executed must be suppressed. *Id.*

4. Deputy Jarvis intentionally, deliberately, and with reckless disregard of the truth made material misrepresentations is the Declaration of Probable Cause which must be redacted.

In *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d (2013), an investigating officer filed an affidavit of probable cause wherein the Detective deliberately misrepresented that the defendant's roommate had

told her that the defendant kept a red, locked box containing pornographic magazines with photographs of unclothed children under 16 years of age in sexually explicit poses for sexual gratification. The roommate had actually told her that the defendant kept a red box with pornography, including "*Playboy*" magazines and "*Barely Legal* " magazines. *Id.* at 848.

The *Ollivier* Court noted that the difference was significant because child pornography is illegal to possess. The trial court also redacted the statement that the roommate saw the defendant looking at both computer and print images of children under 10, when the roommate actually said only that he saw the defendant viewing computer images.

Here, as in *Ollivier* where the court redacted statements which were embellished by the investigating officer to change lawful behavior into criminal behavior, the Court should have redacted Deputy Jarvis' false claim that "Mr. Burton said that he was not a medicinal marijuana patient, therefore had no legal reason to be in possession of marijuana." The court should redact the statement because that is not what was said, and it was not Mr. Burton who said it.

The false claim is material because RCW 69.51A.085 is clear that only qualifying patients may participate in a collective garden. "*Qualifying patients* may create and participate in collective gardens ..." RCW 69.51A.085(1). "No useable cannabis from the collective garden is delivered to anyone other than one of the *qualifying patients* participating in the collective garden." RCW 69.51A.085(1)(e). "... the creation of a

"collective garden" means *qualifying patients* sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use ..." RCW 69.51A.085(2).

If Mr. Burton were not a qualifying patient, he could not legally participate in the collective garden. Deputy Jarvis intentionally, deliberately and recklessly changed the statement, and who said it, in order to change lawful behavior into unlawful behavior.

The case before this court is even more egregious than *Ollivier* in that, in *Ollivier*, the investigating officer at least correctly stated that alleged offending behavior occurred in the defendant's bedroom. Here, the investigating officer intentionally and recklessly changes the location of where the falsely stated offending conduct allegedly occurred.

Green Path is a collective garden located in a storefront. Deputy Jarvis intentionally and recklessly uses the words *store* and *business* to describe the *collective garden*. He does so because Deputy Jarvis knew that if he used the correct term *collective garden* instead of *store* or *business* he would be describing lawful activity and that it would be unlikely that a judge would authorize a search warrant.

Deputy Jarvis uses the words *store* and *business* even though he has no evidence of any business activity. None of the officers saw anybody come or go from Green Path much less observe business activity. Further, Mr. Burton did not make a single statement admitting or even describing business activity.

Mr. Burton stated that he was one of the owners of Green Path (he did not use the word business that was Deputy Jarvis' embellishment). Mr. Burton said Green Path was a collective garden. Mr. Burton explained that the storefront where they were served as the garden's "clubhouse" and functioned as a gathering place for members and served as the garden's distribution hub. At no time does Mr. Burton use the words *store* or *business.* Mr. Burton consistently and at all times described lawful activity.

The intentional and reckless use of the words *business*, *store*, and *customer* are material because RCW 69.51A.085 authorizes collective gardens. RCW 69.51A.085 does not explicitly authorize *businesses*, *stores*, or other entities with *customers.* Again, Deputy Jarvis intentionally, deliberately, and recklessly used words which did not apply in order to change authorized lawful behavior into unauthorized and therefore unlawful behavior.

It is also significant to note that Deputy Jarvis claims evidence of criminal intent in the fact that Mr. Burton contacted his attorney prior to allowing him to inspect files without a warrant. The records were *available* as required by law. Mr. Burton's invited the officers to view the records but insisted on his attorney being present when they did. Deputy Jarvis portrays the right to counsel, and the right to have counsel present during a warrantless search, as evidence of criminal intent. When the constitutional right to insist on a search warrant, and the constitutional

right to counsel become evidence of criminal intent, we have problems much bigger than marijuana.

The declaration of probable cause for a search warrant provides insufficient evidence for the search warrant even *with* the offending statements outlined above. However, the declaration of probable cause for a search warrant is even more problematic when we make the appropriate redactions.

Deputy Jarvis intentionally, deliberately, and recklessly omitted material witnesses; he intentionally, deliberately, and recklessly used incorrect words to create the impression of criminal activity; he intentionally, deliberately, and recklessly changed the words in a statement and attributed that altered statement to the defendant knowing that it was one of the omitted witnesses who actually made the statement.

In this case, the Court should have ordered redaction of the offending portions of Deputy Jarvis' Declaration of Probable Cause. So redacted, there is insufficient evidence to establish the probable cause required for a search warrant.

The Court erred when, at the conclusion of the *Franks* hearing, the Court stated that "there were no deliberate omissions or a reckless disregard for the truth." However, the Court concluded differently in its ruling at the conclusion of Mr. Burton's CrR 3.6 hearing the; Court stated:

> The next paragraph talks about Mr. Burton saying that he was not a medical marijuana patient and had no legal reason to be in possession of marijuana. The facts deduced at the hearing are otherwise and there has been confusion by both Officer Nordstrom and Officer Jarvis as to

whether the statement really came from Mr. Burton or whether it came from another person that he didn't use medical marijuana. At any rate, I don't find this particular statement to have factual support and, therefore, would not supply grounds for probable cause. I think that based on the dispute and the fact that both of the officers have testified that they couldn't say unequivocally that Mr. Burton told them he was not a medical marijuana patient, this particular statement would fail.

It should be noted that there was no testimony at the CrR 3.6 hearing. Mr. Burton moved under CrR 3.6 to quash the search warrant on the grounds that the Declaration of probable cause failed to actually establish probable cause. Accordingly, the Court's analysis was limited to the four corners of the affidavit.

When we scrutinize the Court's ruling, we see that the Court actually took into consideration and relied upon testimony from the Frank's hearing.

After taking testimony and hearing argument after the *Franks* hearing, the Court ruled that Deputy Jarvis did not intentionally, deliberately, or with a reckless disregard for the truth include a material falsehood even though he included legally significant falsehoods.

However, at the conclusion of argument in the CrR 3.6 hearing, the Court ruled exactly opposite.

The Court should have granted Mr. Burton's motion to redact the Declaration of Probable Cause. Deputy Jarvis admits in his testimony that his inclusion of the words *store, business*, and *customer* were words of Deputy Jarvis' choosing determined by him to be accurate prior to his ever even contacting Mr. Burton at Green Path. Inclusion of the words *store,*

business, and *customer* were not words which came up as a result of investigation. These are material falsehoods intentionally included by Deputy Jarvis based upon his own personal belief and opinion formed prior to ever contacting Mr. Burton or anybody at Green Path.

Deputy Jarvis intentionally omitted the presence of two material witnesses, Dan Bivens and Deputy Johnson.

Deputy Jarvis intentionally altered the words in a statement attributed to Mr. Burton. At the *Franks* hearing both Deputy Jarvis and Deputy Nordstrom admitted that if the Declaration of Probable Cause had been accurate, the statement may have been attributed to Mr. Bivens and that the statement did not include the words "I don't have a medical marijuana authorization." Had Deputy Jarvis not manipulated the statement it would have read: "Mr. Bivens stated that he did not even use the medicine."

Deputy Jarvis intentionally omitted facts and intentionally or recklessly misstated others. The Court should have redacted Detective Jarvis' material misrepresentations. When Deputy Jarvis's material misrepresentations are redacted from the Declaration of Probable Cause, there is insufficient evidence by which to find probable cause in support of the warrant. With no probable cause, the search warrant must be quashed and the evidence seized in the execution of the search warrant must be suppressed.

II. THE DECLARATION OF PROBABLE CAUSE FAILED TO ESTABLISH PROBABLE CAUSE.

1. A Declaration of Probable Cause must establish facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity. The circumstances must go beyond suspicion and mere personal belief that criminal acts have taken place.

An affidavit in support of a search warrant must show probable cause. *State v. Cole,* 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *State v. Smith,* 93 Wash.2d 329, 352, 610 P.2d 869 (1980); *State v. Helmka,* 86 Wn.2d 91, 92-93, 542 P.2d 115 (1975). Probable cause requires that the State set "forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999). ... "[I]f in the considered judgment of the judicial officer there has been made an adequate showing under oath of circumstances *going beyond suspicion and mere personal belief* that criminal acts have taken place and that evidence thereof will be found in the premises to be searched, the warrant should be held good." *State v. Patterson*, 83 Wn.2d 49, 515 P.2d 496 (1974)(emphasis added). The circumstances must go *beyond suspicion and mere personal belief.* If the affidavit is purely conclusory the magistrate may not exercise his duty to find probable cause present.

Accurate recital of the factual basis in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. *Patterson*, at 66 (Justice Utter's dissent); quoting *United States v. Ventresca*, 380 U.S.101,108 - 109, 85 S.Ct. 741, 746 (1965). Probable cause requires that the State set "forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

2. Deputy Jarvis failed to establish facts and circumstances sufficient to establish a reasonable inference that Mr. Burton was probably involved in criminal activity when the circumstances were based on his personal suspicion and mere personal belief which were based upon a misunderstanding of medical marijuana law.

In the case at bar, Deputy Jarvis failed to put forth facts and circumstances sufficient to establish a reasonable inference that Mr. Burton was involved in criminal activity. Deputy Jarvis did however put forth facts and circumstances sufficient to establish a reasonable inference that Mr. Burton was involved in a collective garden, a lawful activity.

A. SB 5073 changed the nature of the affirmative defense.

RCW 69.51A states: "Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, *shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law* based solely on their medical use of

cannabis, notwithstanding any other provision of law." RCW 69.51A.050(2)(a). RCW 69.51A.050 also protects Designated Providers and Health care professionals. (See RCW 69.51A.050(2)(b)(c))(emphasis added). The Legislature refers to the *lawful* use, possession, manufacture, and/or delivery of medical marijuana in numerous places in RCW 69.51A; for example, 69.51A.050 is entitled *Medical marijuana,* ***lawful possession***, and RCW 69.51A.045 is entitled *Possession of cannabis exceeding* ***lawful amount***. (emphasis added).

On April 29, 2011, Governor Gregoire signed into law may sections of SB 5073. The Governor stated:

> Today I have signed sections of Engrossed Second Substitute Senate Bill 5073 that retain the provisions of Initiative 692 and provide additional state law protections. Qualifying patients or their designated providers may grow cannabis for the patient's use or participate in a collective garden without fear of state law criminal prosecutions.

The distinction is important when we consider affirmative defenses. In one type of affirmative defense a defendant seeks to be excused for criminal conduct. However, other affirmative defenses, self defense for instance, a defendant does not seek to be excused for criminal conduct, the defendant contends that what was an otherwise unlawful act is in fact lawful.

In *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999), McBride's two sons got into a fight at the family home. Mr. McBride, the father, tried to break up the fight. His son, Brian threw two punches at his father. To protect himself from the third punch, Mr. McBride swung back and hit him in the jaw.

At the hospital, a Sheriff's Deputy investigated. The Deputy took Mr. McBride into custody for fourth degree assault domestic violence. Mr. McBride sued Walla Walla County for false arrest.

The issue before the Court was whether the officer had probable cause to arrest Mr. McBride in light of the fact that his statements to the officer at the hospital indicated that he acted in self-defense. McBride argued it was the officer's duty to evaluate the self-defense claim and determine whether it vitiated the existence of probable cause.

The *McBride* Court held the use of force is lawful when used by a person about to be injured. RCW 9A.16.020(3). Self-defense is an affirmative defense. *McBride,* at 39, citing to *See State v. Thompson,* 13 Wn.App. 1, 6, 533 P.2d 395 (1975). To establish self-defense, a person must establish that a reasonably cautious and prudent person in his situation would use similar force. *Id.* at 40, citing *State v. Theroff,* 95 Wn.2d 385, 390, 622 P.2d 1240 (1980). He must also show that he reasonably believed he was in danger of bodily harm. Whether an individual acted in self-defense is typically a question for the trier of fact. *Id.,* citing *State v. Fischer,* 23 Wn.App. 756, 759, 598 P.2d 742, *review denied,* 92 Wn.2d 1038 (1979); *Thompson,* 13 Wn.App. at 6, 533 P.2d 395.

The *McBride* Court held that self-defense is an affirmative defense which can be asserted to *render an otherwise unlawful act lawful. Id.* at 40, see also RCW 9A.16.020 "lawful use of force" (emphasis added). But

the arresting officer does not make this determination. The officer is not judge or jury; he does not decide if the legal standard for self-defense is met. *Id.*

Like RCW 9A.16.020, the "lawful use of force," RCW 69.51A establishes *lawful* use, possession, manufacture, and/or delivery of medical marijuana.

State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010), came down in 2010, one year prior to the major overhaul of the state's medical marijuana laws in SB 5073.

In *Fry*, police were informed of marijuana growing at Fry's residence. When police approached the home, they smelled burning marijuana. Fry did not consent to a search, but presented a document purporting to be authorization for medical marijuana. The officers obtained a telephonic search warrant, entered the Frys' home, and seized over two pounds of marijuana.

The Fry Court recognized that in RCW 69.51A.040(1) Washington voters created a compassionate use defense against marijuana charges. *Fry,* at 4, citing *State v. Tracy,* 158 Wn.2d 683, 691, 147 P.3d 559 (2006). An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *Id.* at 5, citing *State v. Votava,* 149 Wn.2d 178, 187–88, 66 P.3d 1050 (2003) (citing *State v. Riker,* 123 Wn.2d 351, 367–68, 869 P.2d 43 (1994)). The defendant must prove an affirmative defense by a preponderance of the evidence. *State v. Frost,* 160 Wash.2d

765, 773, 161 P.3d 361 (2007). An affirmative defense does not negate any elements of the charged crime. *Id.*

In 2010, RCW 69.51A had not made medical marijuana lawful. Possession of marijuana remained a crime, but MUMA created a potential affirmative defense that would excuse the criminal act. *Id.* at 8. With the enactment of SB 5073 in 2011, medical marijuana became lawful. And while a medical marijuana patient must still assert an affirmative defense, that affirmative defense is the same as self-defense. No longer is the defendant seeking to be excused for criminal behavior. Now the defendant is seeking to prove that what was an otherwise unlawful act is in fact lawful.

B. In a collective garden, the smell of marijuana, without more, does not establish probable cause.

McBride tells us that if a police officer sees an assault, he has probable cause to arrest. Even though a suspect may claim self-defense, that officer is not required to determine if the suspect can meet all of the legal requirements to establish that his conduct was in fact lawful. Similarly, *Fry* tells us that if a policer officer sees marijuana growing in a suspect's home, he has probable cause to arrest. Even though the suspect may claim that he has an authorization to grow that marijuana, that officer is not required to determine if the suspect can meet all of the legal requirements to establish that his conduct was in fact lawful.

However, if a police officer walks into a gym where people are practicing boxing, and sees people punching each other in the nose, he

does not have probable cause to arrest. Even though he witnesses the actus reus of assault, that behavior is lawful; that is what people are expected to do in boxing gym.

Similarly, if a police officer walks into a collective garden where people grow marijuana, and smells marijuana, he does not have probable cause to arrest. Even though he witnesses the actus reus of manufacturing marijuana, that behavior is lawful; that is what people are expected to do in a collective garden.

If police were to walk into a boxing gym and saw that the boxers had tied people to the corner posts and were beating them to a pulp, that officer would have probable cause to arrest.

Similarly, if police had evidence that the collective garden was delivering marijuana to people who were not qualifying patients, or had evidence that the collective garden had amounts of plants and cannabis which exceeded lawful amounts, or had evidence that the collective garden knowingly accepted forged authorizations, they may have probable cause, authority of law, to interfere in the private affairs of the participating patients in the collective garden.

In the case at bar, the state possessed no such evidence. The Court acknowledged the profound lack of evidence in its ruling. The Court stated:

In this case, there is no evidence of any sale of marijuana to a nonauthorized person, and the Probable Cause to Search Property Declaration does not specify such evidence. There is no evidence of growth of marijuana in amounts that exceed the statutory authorization for

possession of such amounts, and the Probable Cause to Search Property Declaration does not specify such a violation. There is no evidence of consumption of marijuana on the premises of Green Path and the Probable Cause to Search Property Declaration does not specify such an allegation.

There is no evidence of any forged or otherwise invalid authorizations or that there was somehow a methodology for obtaining authorizations that was used or supported by Green Path that would render the authorizations invalid, and there is no such comment in the Probable Cause to Search Property,

In the case at bar, police enter a collective garden and smell marijuana. The State argues that the smell alone is enough to establish probable cause for a search warrant. However, given the fact that one would expect to smell marijuana at a collective garden, without more, police do not have probable cause for a search warrant.

C. Green Path has never had more than ten qualifying patients at any time.

RCW 69.51A.085 limits participation to ten qualifying patients *at any time*. RCW 69.51A.085 is silent on what a collective garden might do if one of the participating members dies from the terminal illness which made him a qualifying patient in the first place, or what a garden might do if a patient recovers from their illness and resigns membership in the garden, or what to do if a member moves, or if a member needs different medicine and decides to participate in another garden. RCW 69.51A.085 does not prohibit a collective garden from accepting new members when their membership is below the upward limit of ten. Similarly, RCW 69.51A.085 does not state how long a member needs to participate, or how long they must be resigned, before he/she may be replaced. RCW

69.51A.085 does not limit the number of gardens a patient may participate in. Most importantly, RCW 69.51A.085 does not prohibit a collective garden from replacing a member who, for whatever reason, is no longer participating in the collective garden.

The Green Path Collective Garden has never had more than ten patients participating in the garden at any time. In the Court's oral ruling, the Court addressed the so-called revolving-style membership of the collective garden operation. The Court observed that the statute was clear that members may come and go to the collective. They may die and be replaced. They may move away and be replaced. They may be cured of their affliction and somehow move away or no longer require the marijuana for medical purposes and, therefore, that would come open. They may simply relinquish their membership to go to another collective garden, thereby, also opening up another spot, shall we say, in the ten for the collective garden operators.

The Court acknowledged that at the time Judge Cuthbertson signed the search warrant, the Court had not decided *State v. Shupe.* The Court held that a fair reading of Shupe would indicate that this type of revolving-style membership based on a parsing of the statutory language would be permitted as long as at no time were there more than ten members, and, in this case, there is no evidence that there were more than ten members. The Court further held this particular element of the revolving-style membership, if not endorsed by the Court, at least has not been found to

be violative of the statute and does not supply a probable cause.

D. *State v. Shupe* makes clear that a collective garden may serve many patients as long as there are never more than ten participating patients at any time.

Prior to July, 2011, RCW 69.51A.010 permitted a non-patient to serve as a "designated provider" to a qualifying patient so long as he was the designated provider to only one patient *at any one time*. RCW 69.51A.010(1)(d)(prior to SB 5073).

Similarly, RCW 69.51A.085 states that no more than ten qualifying patients may participate in a single collective garden *at any time*. RCW 69.51A.085(1)(a).

In *State v. Shupe*, 172 Wn.App. 341, 289 P.3d 741 (Dec. 12, 2012) the Court held that the phrase "at any one time" meant one transaction at a time, and that a designated provider could maintain records on, and service as many qualifying patients as desired, so long as he serviced no more than one patient "at any one time."

Applying the reasoning of the *Shupe* Court, a collective garden may maintain records on, and service as many qualifying patients as desired, so long as there is never more than ten qualifying patients participating in the collective garden "at any time."

In *Shupe*, the defendant owned and operated a medical marijuana dispensary. He testified that he served only one medical marijuana patient at a time, he never delivered marijuana to an individual who did not have documentation, the dispensary took copies of each patient's medical

marijuana patient documentation to keep for its records, and the receipts from the dispensary showed the time to the minute as to when each patient was served.

Mr. Shupe read the phrase "only one patient at any one time" to mean that he could not physically give marijuana to more than one person *at a time*. In other words, Mr. Shupe read the phrase to cover one transaction at a time.

The State argued that "only one patient at any one time" meant that Mr. Shupe could be a marijuana provider to only one person at a time. This would mean that Mr. Shupe could not keep records showing that he was the provider for 1,280 people. Instead, he would have to be the provider for one patient—period.

The Court disagreed. The *Shupe* Court held that "one patient at any one time" meant that a designated provider he could assist as many patients as he liked as long as he not physically give marijuana to more than one person *at a time*.

Prior to *Shupe* the state legislature also agreed with the defendant, Mr. Shupe. When the State enacted SB 5073, the legislature changed the "one patient at any given time" for the designated provider. The legislature added a new fifteen day rule. Clearly the legislature also contemplated that designated providers could assist many patients as long as not physically give marijuana to more than one person *at a time*.

In the case at bar, the phrase at issue is "at any time." As in *Shupe*,

Green Path Collective Garden may keep the records of any number of qualifying patients as long as long as there are no more than ten participating members "at any time."

RCW 69.51A.085 does not provide a methodology or criteria by which we may determine when a qualifying patient is participating in the garden and when a qualifying patient is not participating in the garden.

Green Path of Washington addresses the issue of participation by limiting participation to patients who actually "join" the collective garden and become "members;" however, they must first have their medical authorization verified and then they must sign membership agreements. Green Path of Washington maintains complete records of each individual member which shows the date and time of participation. Analysis of Green Path's records proves that Green Path of Washington has never had more than ten qualifying patients participating *at any time*.

Again, RCW 69.51A.085 is silent on what a collective garden might do if one of the participating members dies from the terminal illness which made him a qualifying patient in the first place; or if a patient recovers from their illness, resigns their membership and no longer participates in the garden; or if a member moves; or if a member needs different medicine and decides to participate in different garden. RCW 69.51A.085 does not prohibit a collective garden from replacing participating members who, for one reason or another terminate their participation in the collective garden. It is therefore obvious that RCW

69.51A.085 is silent as to how long a collective garden must wait before replacing a terminated participating member. Accordingly, Green Path of Washington's practice of replacing resigning members with other qualifying patients complies with RCW 69.51A.085 and is perfectly lawful so long as they never have more than ten participating members *at any time*.

E. The legislature anticipated that the patients who actually participated in any given collective garden could change. The legislature's use of the *at any time* language was intentional and meant to accommodate changing participation in collective gardens.

When the State enacted SB 5073, more than one full year before *Shupe,* and significantly revised Washington's medical marijuana law, the legislature decided to change the "one patient at any given time" for the designated provider. The legislature added a new fifteen day rule. Now a designated provider is still limited to on patient "at any given time;" however, that designated provider cannot leave one patient and go to another until after a fifteen day waiting period.

SB 5073 created a state wide comprehensive regulatory system for the distribution of medical marijuana. SB 5073 provided for the licensing of retail medical marijuana dispensaries. The Legislature did not want "professional" designated providers competing with the newly licensed dispensaries. Therefore, the legislature imposed the fifteen day rule to limit the activities of designated providers.

Also in SB 5073, the legislature created collective gardens. The

legislature included language that a collective garden could not have more than ten qualifying patients participating *at any time*. In the same bill, the legislature qualified that "at any one time" language in the designated provider section of the bill by adding a fifteen day waiting period. The legislature, if it so desired, could have likewise imposed a waiting period for collective gardens; it did not.

The legislature knew it could impose a waiting period on collective gardens if it so desired, it had just done so for designated providers. By the fact that the legislature declined to impose a waiting period tells us that the legislature intended that there be no waiting period and that collective gardens could replace participants as often as necessary or desired.

F. Green Path of Washington maintained a copy of each qualifying patient's valid documentation along with a copy of the patient's proof of identity. The valid documentation was readily available to officers.

RCW 69.51A.085 requires that a collective garden maintain a copy of each qualifying patient's valid documentation ... including a copy of the patient's proof of identity, and that it be available at all times on the premises of the collective garden. RCW 69.51A.085(1)(d).

Green Path of Washington maintained a copy of each qualifying patient's valid documentation along with a copy of the patient's proof of identity which was available when the officers contacted Mr. Burton. In his Declaration of Probable Cause Deputy Jarvis wrote that the documentation was on the wall and in plain view stating that he could see about a three inch stack of papers clipped into six different bunches.

In his testimony, Deputy Jarvis admitted that he could have inspected the documentation which was readily available and posted on the wall in plain view. All he had to do was wait until Mr. Burton's attorney could be present.

The officers, apparently believing that their authority to "see your papers" supersedes the Constitutional requirement of a search warrant, informed consent, and the right to counsel, were no longer interested in inspecting the records, preferring instead to portray the delay as criminal conduct and evidence of probable cause for a search warrant.

The Court specifically addressed the availability of the records in the oral ruling. The Court noted that Washington State Law mandates that a collective garden have a copy of each of its ten patients' IDs and medical marijuana authorizations available for inspection at all times. In this case, by all accounts, they were available.

The Court noted that statute does not talk about how those documents are to be accessed. In this case, the records were readily available. Mr. Burton offered to let the officers inspect the records. Unfortunately, the officers were too impatient to wait for Mr. Burton's attorney.

G. A collective garden is not a place where plants grow. As a matter of law, collective garden is an activity wherein qualifying patients share in the responsibility of gathering the resources necessary to produce and process medical cannabis.

The State argues that the legislature intended that medical marijuana be transported or delivered from the collective garden itself.

When the state uses the term "collective garden" we must presume the state means the actual site or sites where the marijuana is actually grown. The state argues that "under the plain meaning of the statutory language, the collective garden must, indeed, be a garden." State's brief at 30. The State needs to read the statute more closely. RCW 69.51A.085(2) states :

> ...the creation of a "collective garden" means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

Contrary to the state's position, a collective garden is not a place where plants grow. RCW 69.51A.085(2) describes "collective garden" as an activity wherein qualifying patients share in the responsibility of gathering the resources necessary to produce and process medical cannabis.

In RCW 69.51A.085(2) the legislature did not expressly limit where the activities of the collective garden must occur. Produce means to grow marijuana. Process means to package, label, extract oils, and infuse oils into liquid and food products. It is obvious that production and processing will not likely occur in the same location, and are more likely to occur in at least two locations.

Because medical marijuana patients suffer from a variety of terminal illnesses and debilitating conditions, there are many different symptoms which need to be treated. There are many strains of marijuana.

Some strains are more effective in treating some symptoms than others. Because the patients participating in the collective garden will normally require more than one strain, there is typically more than one grow site. RCW 69.51A.085(1) states:

> Qualifying patients may create and participate in collective gardens for the purpose of *producing, processing, transporting, and delivering* cannabis for medical use subject to the following conditions ... (emphasis added).

If all of the activities of all the members of the collective garden were meant to occur at the grow site or sites, the legislature would not have included the words "transporting and delivering."

With up to ten patients accessing the garden's medicine at any one time, there must be a central location where those patients may access the garden's medicine. Because the participating patients are sharing the responsibility of acquiring and supplying resources, there must be a central location where the patients can meet and coordinate those contributions of supplies, money for the supplies, and effort needed to actually grow and then process the medical marijuana. Further, because patients come and go from garden participation for various reasons, there needs to be a central location where the members of the garden can coordinate the membership making sure that the participating patients hold valid authorizations, comply with state law, and ensure that the garden never has more than ten patients participating at any one time.

Here, Mr. Burton described his location as a sort of clubhouse where members meet, and a distribution hub for the garden's medicine.

Mr. Burton not only describes exacting lawful activity, Mr. Burton describes a sophisticated collective garden which efficiently and effectively oversees and coordinates, production, processing, transportation, delivery, and active membership in the garden.

The members of Green Path collective garden go above and beyond what RCW 69.51A.085 actually requires. The members of Green Path collective garden should be held out as examples of what a collective should be under state law, not prosecuted.

In its oral ruling the Court addressed the State's position that the growing portion of the garden's activities must be in the same location as the collective garden distribution center. The Court correctly ruled that the State's position is not supported by case law. The Court held that there is no statutory requirement of having these two functions of the collective garden being under the same roof. "Reading RCW 69.51A as a whole, 69.51A.085 (1) discusses decriminalization of collective gardens for the purpose of growing, processing, transporting and distributing marijuana. This implies that the marijuana which is part of the collective effort may eventually be located at a place other than the point where it is grown. Whether it's processed, where it's grown, is left open by the statute. Where it must be is left open by the statute, but it clearly talks about transporting, which would imply that it would be moved from where it was grown.

CONCLUSION

The State Legislature recognizes the medical evidence that some patients with terminal or debilitating medical conditions may benefit from

the medical use of cannabis. And that humanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion.

Currently, there is no regulated distribution system for medical marijuana. The closest thing the state has is the collective garden. A collective garden, as defined in RCW 69.51A.085(2), describes an association of medical marijuana engaged in the activity of gathering the resources necessary to grow and distribute medical marijuana.

RCW 69.51A.085 does not limit the number patients who may participate in any collective garden. The only limit imposed by RCW 69.51A.085 is that there not be more than ten patients *at any time.*

The legislature recognizes that patient with terminal illnesses sometimes die. The collective garden may replace them. Some patients recover and get well. The collective garden may replace them. Some patients move on to other collective gardens. The collective garden may replace them as well.

Green Path of Washington, Mr. Burton's collective garden is a sophisticated affair. There are multiple grow sites. There are multiple processing sites. Man medical marijuana patients participate in the garden from time to time depending on their individual need.

Green Path maintains a central location where patients may join or resign from the collective garden as the case may be. It is at that central location where participating patients access the garden's medicine.

Green Path is not a store nor is it a business. Green Path is a collective garden.

This case turns on official misconception of collective gardens born of bias against marijuana. When Sheriff's Deputies contacted Mr. Burton they were not there to investigate, they were there to arrest him.

Deputy Jarvis twisted and turned the words in the Declaration of Probable Cause in an effort to accomplish law enforcement's goal – Arrest those potheads!

In the case at bar, the trial court got it right. This Court must affirm.

DATED this 24 day of February, 2015.

Jay Berneburg WSBA 27165
Attorney for Mr. Burton

COURT OF APPEALS – DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, vs. ALFRED G. BURTON, Respondent.	NO. 46304-1-II DECLARATION OF SERVICE

DECLARATION

I declare under penalty of perjury of the laws of the State of Washington that the following is true and correct.

On this date I personally EMAIL served via JBLcopier@gmail.com a Respondent's brief to trobert@co.pierce.wa.us in the above encaptioned case. On this day I also mailed via first class the original to the Court of Appeals Division II postmarked for today.

DATED this 23rd day of February, 2015.

/s/ Kym Schodron
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